91-466

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

JAMES F. HAGER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT IN A CRIMINAL CASE

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QUESTIONS PRESENTED

I. WHETHER THE DISTRICT COURT'S DETERMINATION OF PETITIONER'S COMPETENCY TO STAND TRIAL WAS SUPPORTED BY SUFFICIENT, PROBATIVE EVIDENCE.

II. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT APPLIED AN INCORRECT STANDARD IN REVIEWING THE DISTRICT COURT'S DECISION ON PETITIONER'S COMPETENCY TO STAND TRIAL.

III. WHETHER EXPERT OPINION ON THE ISSUE OF COMPETENCY TO STAND TRIAL MAY BE DISREGARDED IN FAVOR OF LAY TESTIMONY.

IV. WHETHER PETITIONER WAS GIVEN A FULL, FAIR AND MEANINGFUL COMPETENCY HEARING SUFFICIENT TO COMPLY WITH THE CONSTITUTIONAL REQUIREMENT OF DUE PROCESS OF LAW.

V. WHETHER PETITIONER WAS REQUIRED TO OBJECT TO THE ACTIONS OF THE DISTRICT COURT WHEN IT FAILED TO PERMIT FURTHER MEDICAL EVALUATIONS OF PETITIONER AS IT SO STATED AT THE COMPETENCY HEARING, AND TO THE DISTRICT COURT'S CONSIDERATION OF MATERIAL THAT WAS NOT PRESENTED IN PETITIONER'S COMPETENCY HEARING.

STATEMENT OF CORPORATE AFFILIATION

No corporations are involved in this matter.

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October Term, 1991

JAMES F. HAGER,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT IN A CRIMINAL CASE

OPINIONS BELOW

The decision of the United States Court of Appeals affirming Petitioner's conviction was entered on June 21, 1991. The decision was not reported and a copy of the unpublished opinion is attached. *United States* v. *Hager*, Slip Op. No. 90-4110 (6th Cir. June 21, 1991) (copy attached; appendix p. 1a). No application for rehearing was filed. The district court's judgment and commitment order was entered on November 30, 1990. The district court's opinion and order finding Petitioner competent to stand trail, which is the basis

for this petition, was entered on March 6, 1990 (copy attached; appendix p. 11a).

JURISDICTIONAL STATEMENT

The decision of the United States Court of Appeals for the Sixth Circuit affirming Petitioner's conviction was entered on June 21, 1991. The writ of certiorari is requested pursuant to 28 U.S.C. § 1254(1).

CONSTITUIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment, United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Title 18, United States Code § 4241, which provides that:

> (a) Motion to determine competency of defendant. At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall

order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report. Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247 (b) and (c).

(c) Hearing. The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition. If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequence of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until

(A) his mental condition is so improved that

trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

(e) Discharge. When the director of the facility in which a defendant is hospitalized pursuant to subsection (d) determines that the defendant has recovered to such an extent that he is able to understand the nature and consequence of the proceedings against him and to assist properly in his defense, he shall promptly file a certificate to that effect with the clerk of the court that ordered the commitment. The clerk shall send a copy of the certificate to the defendant's counsel and to the attorney for the Government. The court shall hold a hearing conducted pursuant to the provisions of section 4247(d), to determine the competency of the defendant. If, after the hearing, the court finds by a preponderance of the evidence that the defendant has recovered to such an extent that he is able to understand the nature and consequences of the proceedings, against him and to assist properly in his defense, the court shall order his immediate discharge from the facility in which he is hospitalized and shall set the date for trial. Upon discharge, the defendant is subject to the provisions of chapter 207.

(f) Admissibility of finding of competency. A finding by the court that the defendant is mentally competent to stand trial shall not prejudice the defendant in raising the issue of his insanity as a defense to the offense charged, and shall not be admissible as evidence in a trial of the offense charged.

3. Title 18, United States Code § 4247 which states that:

(a) Definitions. As used in this chapter.

(1) "rehabilitation program" includes

(A) basic educational training that will assist the individual in understanding the society to which he will return and that will assist him in understanding the magnitude of his offense and its impact on society;

(B) vocational training that will assist the individual in contributing to, and in participating in, the society to which he will return;

(C) drug, alcohol, and other treatment programs that will assist the individual in overcoming his psychological or physical dependence; and

(D) organized physical sports and recreation programs; and

(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the charactristics of the defendant.

(b) Psychiatric or psychological examination. A psychiatric or psychological examination ordered pursuant to this chapter shall be conducted by a licensed or certified psychiatrist or psychologist,

or, if the court finds it appropriate, by more than one such examiner. Each examiner shall be designated by the court, except that if the examination is ordered under section 4245 or 4246, upon the request of the defendant an additional examiner may be selected by the defendant. For the purposes of an examination pursuant to an order under section 4241, 4244, or 4245, the court may commit the person to be examined for a reasonable period, but not to exdeed thirty days, and under section 4242, 4243, or 4246, for a reasonable period, but not to exceed forty-five days, to the custody of the Attorney General for placement in a suitable facility. Unless impracticable, the psychiatric or psychological examination shall be conducted in the suitable facility closest to the court. The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, 4244, or 4245, and not to exceed thirty days under section 4242, 4243, or 4246, upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

(c) Psychiatric or psychological reports. A psychiatric or psychological report ordered pursuant to this chapter shall be prepared by the examiner designated to conduct the psychiatric or psychological examination, shall be filed with the court with copies provided to the counsel for the person examined and to the attorney for the Government and shall include

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's finding; and

(4) the examiner's opinions as to diagnosis, prognosis, and

(A) If the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

(B) if the examination is ordered under section 4242, whether the person was insane at the time of the offense charged;

(C) if the examination is ordered under section 4243 or 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another;

(D) if the examination is ordered under section 4244 or 4245, whether the person is suffering from a mental disease or defect as a result of which he is in need of custody for care or treatment in a suitable facility; or

(E) if the examination is ordered as a part of a presentence investigation, any recommendation the examiner may have as to how the mental condition of the defendant should affect the sentence.

(d) Hearing. At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain

adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

(e) Periodic report and information requirements.

(1) The director of the facility in which a person is hospitalized pursuant to

(A) section 4241 shall prepare semiannual reports; or

(B) section 4243, 4244, 4245 or 4246 shall prepare annual reports concerning the mental condition or the person and containing recommendations concerning the need for his continued hospitalization. The reports shall be submitted to the court that ordered the person's commitment to the facility and copies of the reports shall be submitted to such other persons as the court may direct. A copy of each such report concerning a person hospitalized after the beginning of a prosection of that person for violation of section 871, 879, or 1751 of this title shall be submitted to the Director of the United States Secret Service. Except with the prior approval of the court, the Secret Service shall not use or disclose the information in these copies for any purpose other than carrying out protective duties under section 3056(a) of this title.

(2) The director of the facility in which a person is hospitalized pursuant to section 4241, 4243, 4244, 4245, or 4246 shall inform such person of any rehabilitation programs that are

available for persons hospitalized in that facility.

(f) Videotape record. Upon written request of defense counsel, the court may order a videotape record made of the defendant's testimony or interview upon which the periodic report is based pursuant to subsection (3). Such videotape record shall be submitted to the court along with the periodic report.

(g) Habeas corpus unimpaired. Nothing contained in section 4243 or 4246 precludes a person who is committed under either of such sections from establishing by writ or habeas corpus the illegality of his detention.

(h) Discharge. Regardless of whether the director of the facility in which a person is hospitalized has filed a certificate pursuant to the provisions of subsection (e) of section 4241, 4243, 4244, 4245, or 4246, counsel for the person or his legal guardian may, at any time during such person's hospitalization, file with the court that order the commitment a motion for a hearing to determine whether the person should be discharged from such facility, but no such motion may be filed within one hundred and eighty days of a court determination that the person should continue to be hospitalized. A copy of the motion shall be sent to the director of the facility in which the person is hospitalized and to the attorney for the Government.

(i) Authority and responsibility of the Attorney General. The Attorney General

(A) may contract with a State, a political subdivision, a locality, or a private agency for the confinement, hospitalization, care, or treatment of, or the provision of services to a per-

son committed to his custody pursuant to this chapter;

(B) may apply for the civil commitment, pursuant to State law, of a person committed to his custody pursuant to section 4243 or 4246;

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, 4243, 4244, 4245, or 4246, consider the suitability of the facility's rehabilitation programs in meeting the needs of the person; and

(D) shall consult with the Secretary of the Department of Health and Human Services in the general implementation of the provisions of this chapter and in the establishment of standards for facilities used in the implementation of this chapter.

(j) This chapter does not apply to a prosecution under an Act of Congress applicable exclusively to the District of Columbia or the Uniform Code of Military Justice.

4. Rule 46 of the Federal Rules of Civil Procedure which provides that:

Formal exception to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or the party's objection to the action of the court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

5. Rule 51 of the Federal Rules of Criminal Procedure which provides that:

> Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which that party desires the court to take or that party's objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party.

6. Rule 52 of the Federal Rules of Criminal Procedure, which provides:

> (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

7. Rule 103 of the Federal Rules of Evidence, which provides that:

> (a) Effect of erroneous ruling. — Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) Objection. — In the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) Offer of proof. — In case the ruling is one ex-

cluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. — The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. — In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. — Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

STATEMENT OF THE CASE

A multiple-count indictment was returned by a federal grand jury charging Petitioner James F. Hager and others with, *inter alia*, a conspiracy to distribute marihuana and a continuing criminal enterprise. Prior to trial, a motion to determine Petitioner's competency to assist in his own defense and to understand the nature of the charges against him was filed by defense counsel on June 28, 1989. United States District Judge Joseph P. Kinneary entered an order on June 30, 1989, granting that motion and requiring Petitioner to be transported to the Medical Center for Federal Prisoners in Springfield, Missouri (hereinafter "Medical Center"), for a "psychiatric or psychological examination by a licensed or certified psychiatrist or psychologist pursuant to 18 U.S.C. § 4241 and § 4247(b) . . ." to evaluate whether Petitioner was competent.

The intial order of Judge Kinnery contemplated a thirty-day period for the evaluation. At the request of the Medical Center, however, the time period was extended until August 15, 1989. On August 16, 1989, the evaluation period was again extended at the request of the Medical Center, but this time no fixed time period was set; the court ordered the Medical Center to advise it when the evaluation of Petitioner has been completed. Subsequently, the Medical Center submitted a report to the district court concluding that Petitioner was unable to assist in his own defense or to fully appreciate the nature of the charges pending against him. Pursuant to 18 U.S.C. § 4241(d), and a joint motion by the government and defense counsel, the district court ordered that Petitioner be returned to the Medical Center for further treatment and evaluation for a four-month period. Again, the Medical Center professional staff determined Petitioner was incompetent and submitted a report so concluding with the district court.

On March 6, 1990, a competency hearing was held by the district court. Expert testimony was heard that the Medical

Center personnel believed that Petitioner was incompetent. Another inmate at the Medical Center testified that Petitioner stated that he was merely "faking" his disabilities in order to avoid trial.

Notwithstanding the fact that the district court stated at the conclusion of the hearing that he intended to permit further examination of Petitioner by medical professionals, Petitioner was found competent to stand trial on May 11, 1990. A notice of appeal from that order was filed. A motion for a stay of proceedings pending appeal was filed with the district court and granted in an order dated May 30, 1990.

On June 7, 1990, the Court of Appeals for the Sixth Circuit entered an order dismissing the appeal *sua sponte* holding that in this situation a determination of competency to stand trial is "reviewable in an appeal from conviction and sentence." Upon remand, Petitioner and the government agreed to waive a jury, and the case was tried to the district court. Stipulations were entered of record, and Petitioner was found guilty of Counts One, Six and Twelve of the indictment. Petitioner was sentenced as appears of record. From that judgment and sentence Petitioner again appealed to the Court of Appeals for the Sixth Circuit. In that appeal, Petitioner presented two (2) issues: First, that there was insufficient evidence upon which the district court could find Petitioner competent to stand trial; and, second, that the manner in which the competency hearing was held denied Petitioner due process of law because it was not a full, fair and meaningful competency hearing.

The facts of this case are not disputed. While Petitioner was awaiting trial in this matter he was incarcerated in Columbus, Ohio. In June of 1989, Petitioner was attacked by another inmate, and Petitioner suffered "a severe head injury. . . ." Report of Donald R. Butts, M.D., dated January 16, 1990, Defendant's Exhibit A (herinafter "Butts Report"; copy attached) appendix p. 24a. Petitioner suffered "a left posterior linear skull fracture with a contused brain, intra-

cerebral hematoma, and a minor midline shift of brain structureds." *Id.* In layman's terms, Petitioner's skull was cracked by the force of the blow, and his brain was bruised and moved out of its proper position by the force of the blow. *See* Schmidt, *Attorney's Dictionary of Medicine* (1990 ed.) vol. 2, pp. F-110; H-40. Furthermore, Petitioner's injury resulted in a hematoma, which is a mass of blood confined in the brain resulting in a tumor or swelling of tissue caused by the collection of clotted blood. *Id.* at H-40. These physical injuries, together with distinct personality changes, prompted concern about Petitioner's ability to assist in his own defense and to understand the nature of the legal proceedings and the numerous complex charges pending against him. While Petitioner was confined at the Medical Center, he was again attacked by a "mentally disturbed patient on the ward . . ." who struck Petitioner on the head with a broomstick on July 23, 1989. Report of David L. Reuterfors, Ph.D., dated September 6, 1989, Defendant's Exhibit, p. 19a (hereinafter "Reuterfors Report"; copy attached) appendix p. 16a.

At the competency hearing, Petitioner's physical injury was described by the government's physician from the Medical Center, Donald R. Butts, M.D. Dr. Butts described the injury as a fracture on the left side of the skull and "the underlying soft tissues were torn and contused and a large blood clot had developed. . . ." Petitioner's brain was described as having been "pushed out of the way into positions that were not anatomically correct, and it exerted pressure on the other brain structures." Dr. Butts testified that "[i]f you have an injury from one side, the brain will go and strike the opposite side of the skull, which is unyielding, and [the brain] will bounce back. . . ."

During petitioner's initial three-month evaluation at the Medical Center, and also later during his four-month treatment and evaluation, the professional staff at the Medical Center drafted reports containing their collective opinion regarding Petitioner's competency. Both of these reports (the Reuterfors Report and the Butts Report) come to the identical

conclusion: Petitioner was incompetent. Both of these reports, while signed by the particular doctor with the overall responsibility for the evaluation of Petitioner, include and account for the input and opinions of the entire Medical Center clinical team , including nurses, clinical psychologist, correction officers and other medical doctors.

At the competency hearing, Dr. Butts testified about the various procedures used at the Medical Center to evaluate Petitioner's mental ability. Dr. Butts was a Staff Psychiatrist and had been interim Chief of Psychiatry at the Medical Center. Dr. Butts had been a practicing psychiatrist for fifteen (15) years at the time of Petitioner's competency hearing. Dr. Butts testified that the evaluation of Petitioner's mental state included a review of Petitioner's medical history, laboratory data, a physical examination and a neurological evaluation.

The type of physical injury suffered by Petitioner is well-known in the medical community to have the potential for very serious consequences. Depending on the location of the injury "it can affect how you speak or how you perceive information or it can affe your hearing, or if its in the very back of the head, it can affect your vision." Because Petitioner's mental problems were believed to be organic in nature, numerous medical tests were given, *i.e.* a CT (computerized tomography) brain scan, an electroencephalogram, a contrast and a non-contrast brain scan, and x-ray examinations of Petitioner's skull. Additionally, Petitioner was examined on several occasions by a neurological specialist.

In addition to purely physical examinations and tests, Petitioner was also given a battery of psychological and psychiatric tests, including the Halstead-Reitan Neuropsychological series of tests, the Wechsler Adult Intelligence Scale-Revised test, the Wechsler Memory Scale-Revised test and the Minnesota Multiphasic Personality Inventory. Reuterfors Report p. 3-4. The most important of these tests for purposes of determining Petitioner's competency was the Halstead-

Reitan Neuropsychological Test Battery, which yielded an impairment index of .86. Reuterfor Report p. 4. This impairment index placed Petitioner in a "severly impaired range" regarding his mental ability and, furthermore, "the neuropsychological test battery suggested the presence of bilateral organic impairment." *Id.* In somewhat simpler terms, both sides of Petitioner's brain had been physically damaged. *See Webster's Seventh New Collegiate Dictionary* (1967 ed.)

At the competency hearing Dr. Butts, explained in detail the importance of the Halstead-Reitan Neuropsychological Test Battery (hereinafter "Halstead-Reitan"). As opposed to most psychological tests which are subjective, the Halstead-Reitan is a predominately *objective* "state of the art" test which determines the organic or physical impairment of mental functioning due to brain damage. The Halstead-Reitan test placed Petitioner in the severly impaired range and indicated the presence of "bilateral organic impairment; that is to say, problems on both sides of the brain rather than unilateral."

Thus, Dr. Butts's (and Dr. Reuterfors's) expert opinion was that Petitioner was not competent to assist in his own defense or to fully understand the nature of the charges against him because of his impaired mental functioning, which was "a *direct result* of the skull trauma that he underwent in the summer of 1989. His symptoms are classical; they are textbook symptoms *and believable; his degree of functional impairment is consistent with the anatomical lesions as we understand them.*" (emphasis added). Petitioner, therefore, has no psychological or psychiatric defect or disease; however, the evidence was that there is objectively determinable physical brain damage which has resulted in serious impairments of his mental ability that the doctors believed made it impossible for Petitioner to realisticaly assist in his own defense, as well as understand the nature of the charges.

Dr. Butts described in detail the kind and degree of impairments from which Petitioner suffers. The "impairment is

across the board . . . there is no area in which [Petitioner] is completely comparable to his premorbid personality. . . ." Dr. Butts stated that leaving "his legal problems aside, if he were functioning in a civilian situation that he would have to have assistance." As examples Dr. Butts stated that, "I don't think it would be safe for him to drive, for instance, nor would it be to take a public conveyance from point A to point B in a large town." Similarly, Dr. Butts did not think that Petitioner could live independently due to his impairment. Petitioner lacks "the cognitive ability [to] decide what was in his best interest at a critical moment, like not to cross the street in front of that truck. . . ."

When specially questioned about Petitioner's ability to function in a trial setting, Dr. Butts stated that Petitioner would not have the ability to listen to and comprehend the testimony of witnesses. Further, Dr. Butts was of the opinion that if Petitioner testified in his own behalf, "he would probably deteriorate on the stand." Similarly, Dr. Butts stated that petitioner had the ability to discuss his case with counsel in only "a very rudimentary way" and that Petitioner could not comprehend the subtleties of the charges against him nor the consequences of a guilty verdict. Dr. Butts's opinion, based upon all the tests and evaluations, was that Petitioner was not competent to stand trial and would not likely to become competent again.

The question of whether Petitioner was "faking" his symptoms was raised on cross-examination. Dr. Butts admitted the possibility but stated that in his opinion Petitioner was not faking his symptoms. According to Dr. Butts, in order for Petitioner to have faked these symptoms Petitioner would have to be "a better actor than [Sir] Lawrence Olivier. . . ."

Another witness at the competency hearing was Petitioner's sister, Sue Hager. The sister testified that after Petitioner's skull fracture he stuttered a great deal and his thought processes were very disjointed. Furthermore, Petitioner's sister testified that Petitioner's problems were less severe when he

was dicussing relatively innocuous subjects, such as the weather, but became much more pronounced when Petitioner discussed stressful subjects, such as his son's then current hospitalization.

Two witnesses testified on behalf of the government. The first, United States Marshall Robert Obenour, was the person who transported Petitioner to the Medical Center for Petitioner's second period of evaluation at that facility. During the approximately three or four hour trip, Obenour testified that he heard Petitioner speak without stuttering for five or six minutes. Obenour also testified that Petitioner did stutter at other times during the trip, and during the short period of time when Petitioner went without stuttering nothing important was discussed; Obenour classified the subject matter as "casual small talk."

The government's second witness was Scott Hansen, an inmate confined at the Medical Center for non-medical reasons as part of a work cadre, and Hansen testified that Petitioner told him that he went to the library every day to check on the price of gold. According to Hansen, Petitioner stated that he had a large amount of gold "stashed," and Petitioner wanted to keep up with the current market price for gold. Hansen also testified that he became friendly with Petitioner, and Petitioner loaned him twenty-five hundred dollars ($2,500.00) so that Hansen could attend his mother's funeral. When the prison warden allegedly refused to permit Hansen to go to the funeral, Hansen testified that Petitioner told him to "just hold onto [the money]. . . ." Hansen testified that Petitioner did not stutter when he spoke to Hansen, but stuttered in front of everyone else, and that Petitioner was looking for ways to "fool" the staff into believing he was incompetent.

At the conclusion of the competency hearing the following colloquy occurred between the court and counsel; the district court stated that:

> The evidence is closed. I want counsel on both sides to submit a memorandum telling the Court what they have proved here this morning. You don't have to dwell on law. Just dwell on the evidence. *How much time do you want to do that? Two weeks, three weeks? Before you answer that question, I'm going to tell you I am going to submit this defendant to further psychiatric examination. I will keep counsel well advised when and where it's going to take place, see; but in the meantime, how much time do you want?* (emphasis added).

Notwithstanding the foregoing, on May 11, 1990, the court in an opinion and order found Petitioner competent to stand trial and, *inter alia*, that Petitioner had "fooled Dr. Butts." Order p. 5.

REASONS FOR GRANTING THE WRIT

I. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT THE COMPETENCY HEARING FOR THE DISTRICT COURT TO FIND PETITIONER COMPETENT TO STAND TRIAL.

It has been a long-held fundamental principle of the American justice system that the "trial and conviction of a person . . . incapable of making a defense violates certain immutable principles of justice which inhere in the very idea of free government." *Sanders* v. *Allen*, 100 F.2d 717, 720 (D.C. Cir. 1938). It is similarly well-established that all criminal defendants have a right not to be tried while incompetent, and the trial of such a defendant would violate his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. *United States, ex rel. Bilyew*, v. *Franzen*, 842 F.2d 189 (7th Cir. 1988); *Owens* v. *Sowders*, 661 F.2d 584 (6th Cir. 1981). Moreover, the failure to observe procedures that protect a defendant's right not to be tried while incompetent gives rise to a deprivation of his right to a fair trial. *See Pate* v. *Robinson*, 383 U.S. 375, 385-86, 86 S.Ct. 836, 842 (1966); *Noble* v. *Black*, 539 F.2d 586 (6th Cir. 1976), *cert. denied*, 429 U.S. 1105, 97 S.Ct. 1136 (1977).

This Court has expressly set forth the constitutionally correct test to determine competency:

> [W]hether [the defendant] has sufficient *present ability* to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as a factual understanding of the proceedings against him. *Dusky* v. *United States*, 362 U.S. 402, 80 S.Ct. 788, 789 (1960) (emphasis added).

Under federal law, the burden of proving competency is on the government, and it would be a violation of due process for a court to require a defendant to shoulder any aspect of the burden of proof on the issue. *Phillips* v. *Lane*, 787 F.2d

208 (7th Cir. 1987), *cert. denied*, 479 U.S. 873, 107 S.Ct. 249 (1986); *Brown* v. *Warden*, 682 F.2d 348 (2d Cir. 1982), *cert. denied*, 459 U.S. 991, 103 S.Ct. 349 (1982); *United States* v. *Hollis*, 569 F.2d 199 (3rd Cir. 1977); *United States* v. *Markis*, 535 F.2d 899 (5th Cir. 1976), *cert. denied*, 430 U.S. 954, 97 S.Ct. 1598 (1977); *Conner* v. *Wingo*, 429 F.2d 630 (6th Cir. 1970), *cert. denied*, 406 U.S. 921, 92 S.Ct. 1779 (1972). The government must prove the defendant competent by a preponderance of the evidence in each case. *See Brown* v. *Warden*, *supra* at 532. Furthermore, "there is no room for a rule of law placing any burden of proof on the defendant." *United States* v. *DiGilio*, 538 F.2d 972, 988 (3rd Cir. 1976), *cert. denied sub nom. Lupo* v. *United States*, 429 U.S. 1038, 107 S.Ct. 733 (1977).

A. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT APPLIED AN INCORRECT STANDARD IN REVIEWING THE DISTRICT COURT'S COMPETENCY DETERMINATION.

The ultimate issue of competency has been repeatedly treated as a mixed question of law and fact. *Drope* v. *Missouri*, 420 U.S. 162, 174-75, 95 S.Ct. 896, 905 (1975) n. 10; *Pate* v. *Robinson*, 383 U.S. 375, 385-86, 86 S.Ct. 836, 842 (1966); *Price* v. *Wainwright*, 759 F.2d 1549, 1551 (11th Cir. 1985); *Bruce* v. *Estelle*, 536 F.2d 1051, 1058-60 (5th Cir. 1976), *cert. denied*, 429 U.S. 1053, 97 S.Ct. 767 (1977); *United States* v. *Markis*, 535 F.2d 899, 907 (5th Cir. 1976), *cert. denied*, 430 U.S. 954, 97 S.Ct. 1598 (1977). Because of the fundamental nature of the rights involved if an incompetent were to be tried, a reviewing court must carefully evaluate the factual basis for the district court's conclusion. The Sixth Circuit merely reviewed the district court's decision for "clear error" and "conclude[d] that the district court's *fact finding* that [Petitioner] was competent to stand trial is not clearly erroneous." *Hager*, Slip Op. at 1;11 (emphasis added).

A reviewing court, however, must "take a hard look at the trial judge's ultimate conclusion [of the competency issue] and not allow the talisman of [the] clearly erroneous [standard] to substitute for thoroughgoing appellate review of quasi-legal issues." *United States* v. *Markis*, 535 F.2d at 907; *Lokos* v. *Capps*, 625 F.2d 1258, 1267 (5th Cir. 1980); *see also Drope* v. *Missouri*, 420 U.S. at 175, 95 S.Ct. at 905 (holding that in reviewing a state court's competency determination it is "incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured"). The reviewing court must, therefore, determine that the accused is able "to perform the functions which are essential to the fairness and accuracy of a criminal proceeding." *Wilson* v. *United States*, 391 F.2d 460 463 (D.C. Cir. 1968) (citations omitted). The Court of Appeals erred by merely considering competency "a finding of fact, which we review only for clear error." *Hager*, Slip Op. at 8a (citations omitted).

B. THE COURT OF APPEALS' DECISION IN THIS CASE HOLDS THAT THE TESTIMONY OF AN EXPERT ON THE SUBJECT OF COMPETENCY MAY BE DISREGARDED IN FAVOR OF A LAY WITNESS; THIS HOLDING IS IN DIRECT CONTRADICTION WITH AT LEAST ONE OTHER FEDERAL CIRCUIT.

In this case the district court and the court of appeals completely discounted the finding of two separate medical experts who independently found Petitioner to be suffering from brain damage that occurred as a result of the attack in the Columbus, Ohio, jail facility. *See* Reuterfors Report p. 22a-23a; Butts Report p. 29a. In this manner, both courts ignored an objective medical fact in much the same manner as if they had ignored a medical fact that an accused was physically unable to speak. Furthermore, no evidence was adduced at the competency hearing that would impeach or undermine the expert opinions of the doctors who examined

Petitioner. This decision, therefore, gives expert testimony on the issue of competency the same weight as that of a lay witness.

The case *sub judice* is very similar to *United States* v. *Gray*, 421 F.2d 316 (5th Cir. 1970). In *Gray*, the government argued that expert witnesses' opinions of competency have the same evidentiary value as that of lay witnesses. The contention was specifically rejected by the court of appeals. *Id.* at 319, n.1. The *Gray* Court held:

> [T]he expert testimony was unanimous that [the defendant] was incompetent . . . . [T]he expert testimony was unimpeached. Some of the lay testimony was also to the effect [the defendant] was incompetent. The only evidence to the contrary came from laymen, all of whom testified, in effect, to nothing more than that they had never observed an abnormal act on the part of [the defendant], and none of whom had any prolonged and intimate contact with the accused. *Their testimony is insufficient to establish [the defendant's] competency in the face of unimpeached, expert testimony to the contrary. Id.* at 318-19 (citations omitted; emphasis added).

This clearly disposes of whatever probative value, if any, was contained in the testimony of Robert Obenour, the United States Marshall. Obenour's contact with Petitioner was limited to a three or four hour trip, and his testimony was limited to a five or six minute period. "Lay testimony that a person has never observed an abnormal act on the part of the accused is of value only if the witness has prolonged and intimate contact [with that person]." *United States* v. *Kossa*, 562 F.2d 959, 962 (5th Cir. 1977) (citations omitted) *cert. denied*, 434 U.S. 1075, 98 S.Ct. 1265 (1978). The minimal time Obenour spent in Petitioner's company and the testimony of normal speech patterns for a few minutes cannot, as a matter of law, overcome the expert testimony in this case. Thus:

> The probative value of any opinion on the issue of insanity depends on the facts upon which it is based. When a lay witness' direct knowledge of the defendant is brief and superficial and far removed in time from the commission of the crime or the trial, *the testimony usually should not be admitted* . . . . Its virtual lack of probative value is heavily outweighed by possible prejudicial effect. This is especially true when the purport of the testimony is simply that the defendant was not doing anything bizarre . . . . *[A] statement that a witness never observed an abnormal act is of value if, but only if, the witness had prolonged and intimate contact with the accused. United States* v. *Smith*, 437 F.2d 538, 541 (6th Cir. 1970) (citations omitted; emphasis added.).

In *Smith*, as here, one of the government's witnesses had only listened to the defendant's conversation during an automobile trip with a federal agent. *Id.* Such contact is "anything but prolonged and intimate." *Id.* Obenour's testimony, therefore, cannot be accorded any significance and, because of its "virtual lack of probative value," was of questionable admissibility. Such statements cannot be relied upon to find that Petitioner understood the nature of the proceedings in which he was involved or that he could participate in the preparation of his own defense.

Furthermore, Obenauer's testimony does not contradict the doctors' opinions that Petitioner is unable to consult with his lawyer or that he does not understand the charges against him. While Dr. Butts testified that he had never heard Petitioner speak without stuttering, several of the professional staff at the Medical Center had reported that Petitioner did not always stutter. Further, Petitioner's sister testified that Petitioner could occasionally speak without stuttering when he discussed mundane topics. Finally, Dr. Butts testified that Petitioner's speech problems, technically termed aphasia, was caused by the same injury to the same part of the brain which

rendered Petitioner incompetent, but it was never suggested by any of the medical experts that Petitioner's stuttering was the reason he was unable to effectively help in the preparation of his defense or to understand the nature of the charges he faced.

The district court and the court of appeals placed great emphasis on the supposed fact that Petitioner can control his stuttering and other *physical* impairments and that these symptoms can be faked. "As the government correctly states, the physical complications allegedly suffered by Petitioner are within his control." Opinion and Order finding Petitioner Competent (hereinafter "Opinion and Order") appendix p. 11a. The district court went into great detail discussing the testimony that it believed supported that conclusion. *See id.* at 13a-14a. The court of appeals was concerned that "[a] person can stutter, stagger, and stiffen his extremities at will . . . ." *Hager* Slip Op. at 10. Whether severe stuttering or other *physical* impairments are sufficient to support a finding of incompetency is irrelevant, however, to the sole issue presented here: whether Petitioner was competent, *i.e.* whether Petitioner "ha[d] sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding — and whether he ha[d] a rational as well as a factual understanding of the proceedings against him." *Williams* v. *Bordenkircher*, 696 F.2d 464, 466 (6th Cir. 1983), *cert. denied*, 461 U.S. 916, 103 S.Ct. 1898 (1983). It is the *mental* condition of Petitioner which is at issue, not his *physical* condition, and one whose mental condition is such that he cannot understand the nature of the proceedings in which he is involved, and cannot assist in the preparation of his defense, may not be subjected to trial. *United States* v. *Hollis*, 569 F.2d 199, 204 (2d Cir. 1977). It should be apparent that someone who stutters or has other *physical* impairments can be competent to stand trial as long as he can consult with his lawyer and understands the nature of the charges, just the same, someone who does not stutter can be incompetent to stand trial. The district court and the court of appeals were

led astray by an issue that had no real relevance to the competency determination, and they bypassed the crucial evidence of the undisputed expert opinion that Petitioner would be unable to adequately assist in his own defense, to make an intelligent decision to take the stand in his own defense, or to follow and comprehend the testimony of those witnesses who would testify against him.

The ultimate conclusion of the district court was that Petitioner was simply faking his symptoms and that he fooled both doctors who evaluated him and the rest of the staff at the Medical Center. The district court also relied upon information which was not persented at the competency hearing and was never part of the record. The district court found, as an apparently dispositive factor that:

> [Petitioner] has attempted to elude law enforcement officials for a number of years. His previous status as a fugitive, and the length of time in which the defendant did successfully elude the authorities, is indicative of the defendant's ability to devise and engineer elaborate schemes to avoid his apprehension. The Court is convinced that the defendant's alleged condition is an illustration as to what lengths the defendant will go to skirt the out-reached arms of the law. Opinion and Order p. 15a.[1]

It is unclear whether the district court merely disbelieved the doctors' evidence of brain damage or that the court believed that Petitioner injured himself or orchestrated his own attack. No evidence in the record supports either conclu-

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[1] The district court also relied on other information which is not in the record. For example, the court relied heavily on information it allegedly obtained from the plea and sentencing hearing of one Gary Ankerman, who the court believed to be related to Hager by marriage. *See* Opinion and Order p. 15a. However, none of this information is in the record before this Court, and could not be properly relied upon to determine Hager's competency.

sion, and the organic brain damage found by both doctors was simply ignored. Dr. Butts's testimony that it would take an actor of Sir Lawrence Olivier's ability to fake these symptoms was likewise ignored. Not only was there no evidence regarding Petitioner's pre-arrest actions in the eluding the government, such evidence would have been completely irrelevant because the issue was Petitioner's competency *after* his skull had been fractured and his brain damaged.

It is not being contended that a district court must accept expert opinion on incompetency if there is a rational basis to discount it. *See e.g. United States* v. *Markis*, 535 F.2d at 908. However, where, as here, all the expert opinion points exclusively to a conclusion of incompetency, the trial court "cannot arbitrarily ignore the experts in favor of the observations of laymen." *Strickland* v. *Francis*, 738 F.2d 1542, 1552 (11th Cir. 1984); *see also Brock* v. *United States*, 387 F.2d 254, 257 (5th Cir. 1967) ("some reason must be objectively present for ignoring expert opinion testimony which is sought to be rebuted only by the observations of laymen"). A "trier of fact would not be at liberty to disregard arbitrarily the unequivocal, uncontradicted and unimpeached testimony of an expert witness, *where, as here, the testimony bears on technical questions of medical causation beyond the competence of lay determination.*" *Webster* v. *Offshore Food Service, Inc.*, 434 F.2d 1191, 1193 (5th Cir. 1970) (emphasis added). The decision in this necessarily conflicts with all of these cases.

In *Strickland*, for example, a Georgia state prisoner appealed a district court's denial of a writ of habeas corpus. *Strickland*, 738 F.2d at 1543. Under the Georgia procedure, the issue of competency was tried to a special jury, and the jury returned a general verdict that the defendant was competent. *Id.* at 1544. The court cataloged a number of factors "that reasonably could lead a factfinder to disregard expert testimony on the defendant's mental condition." *Id.* at 1552. The *Strickland* Court held that:

> In assessing the factfinder's decision to disregard the expert's opinion, a court on review should consider: (1) the correctness or adequate of the factual assumptions on which the expert opinion is based; (2) possible bias in the expert's appraisal of the defendant's condition; (3) inconsistencies in the expert's testimony, or material variations between experts; and (4) the relevance and strength of the contrary lay testimony. *Id.* (citations omitted).

The Court of Appeals held that testimony that the defendant was feigning his symptoms was insufficient to overcome the medical experts' testimony that the defendant was incompetent to stand trial. *Id.* at 1552. This decision in this case is in conflict with the decision in *Strickland.*

As noted earlier, Obenour's testimony is insufficient as a matter of law to form a sufficient basis to disregard the expert medical testimony in this case. The testimony of Scott Hansen is similarly insufficient. Hansen's testimony merely was that Petitioner told him that Petitioner checked the Wall Street Journal daily for the current price of gold; Petitioner did not stutter when he was with Hansen; Petitioner asked Hansen about ways to "fool" the doctors; and Petitioner told Hansen something about his upcoming trial, including the fact that he had the government attorney "wrapped around his finger." None of these alleged statements is sufficient to overcome the undisputed and unimpeached expert medical opinion. Each of the *Strickland* factors supports the doctors' conclusions.

(1) The Accuracy And Adequacy Of The Facts Relied Upon By The Medical Experts.

Dr. Butts was specifically asked whether Petitioner's daily checking of gold prices, if it had been generally known when Petitioner was at the Medical Center, would have made any diference in the diagnosis of Petitioner. Dr. Butts unequivocally stated that his diagnosis and opinion of Petitioner's

competency would not have been affected by this information. This isolated fact was a very small datum when considered in light of all of the information about Petitioner that the medical experts had collected. The extensive physiological and psychological testing that Petitioner was subjected to during his nearly seven (7) months of confinement at the Medical Center is fully set forth in statement of facts and it will not be repeated here; it is sufficient to state that even assuming it is true that Petitioner checked the price of gold daily, the expert medical opinion contained in the record before this Court was unchanged.

It is true that the adequacy of the factual basis for an expert's opinion can be challenged if the expert relies solely on the accused's subjective description of his symptoms. *See Strickland*, 738 F.2d at 1553. However, as in *Strickland*, this case "presents no valid reason for disregarding the testimony of experts, whose opinion was based on [the defendant's] documented mental history and objective scores on sophisticated tests, and who were fully aware of the legal consequences of their determination." *Id.*; *see also Wallace* v. *Kemp*, 757 F.2d 1102, 1109 (11th Cir. 1985) (holding that the evidence was insufficient to permit the factfinder to ignore expert medical opinion on issue of competency merely because there was a factual question as to whether the defendant was actually suffering from some of the symptoms he demonstrated or whether he was faking those symptoms).

(2) The Possible Bias Of The Medical Experts.

This second factor strongly supports the medical experts' opinions that Petitioner's mental functioning was substantially impaired. Both doctors were government employees and one of their crucial functions, if not their only function, was to make expert evaluations on the mental state of individuals accused of federal crimes. The government, which selected the doctors as experts qualified to render an accurate and impartial assessment of Petitioner's mental status, did not and could not offer any suggestion that the doctors had any in-

terest in seeing Petitioner declared incompetent. Certainly, such doctors, who work daily with a large number of disturbed individuals, would be keenly aware of the possibility that someone might try to fool them. *See also Brock* v. *United States*, 387 F.2d at 258 (holding that the testimony of a disinterested government expert is not to be disregarded).

(3) The Inconsistency In Expert Opinions Or Conflicts Between Experts.

The third factor does not support disregarding the experts' opinions in this case. All the expert medical opinion in this case is completely consistent, unimpeached and reached identical conclusions: Petitioner was incompetent because of mental impairments caused by brain damage. Certainly, had there been a conflict in the expert testimony, the district court would have been free to adopt the opinion of one expert and reject the opinion of the other. Here, there was no contrary expert opinion. The medical experts did not discuss the test results in any detail or their interpretations of those results. The district court, therefore, could not make an independent evaluation of the physical condition that caused Petitioner's mental problems.

(4) The Comparison Of The Medical Experts' Testimony With The Contrary Lay Testimony.

Finally, Hansen's testimony provides little basis for the concluding that the doctors were "fooled" into a misdiagnosis of Petitioner's mental abilities. Furthermore, here, as in *Strickland*, Hansen "did not offer any direct factual testimony on any of the elements of [Petitioner's] competency." *Strickland*, 738 F.2d at 1554. While Petitioner allegedly told Hansen that he was charged with bringing in large amounts of marihuana to this country, Hansen never heard Petitioner "rationally discuss the upcoming trial and never observed him offering meaningful assistance to counsel . . . ." *See id.* Hansen's other testimony of Petitioner's alleged checking of

gold prices, was not inconsistent with the doctor's diagnosis, and Dr. Butts so testified.

Neither Hansen's testimony that Petitioner was looking for ways to "fool" the doctors nor that Petitioner thought he had the government attorney "wrapped around his finger" indicate that Petitioner was competent. Indeed, even the fact that petitioner may have actually believed that he was fooling the doctors is not probative of whether Petitioner was legally competent. Many individuals who are in fact incompetent because of serious psychological or physical problems may harbor the sincere belief that they are truly normal. Such a belief does not change the fact of their competency. An "incompetent defendant can hardly be accepted as a reliable witness to his own competency." *Fitch* v. *Estelle*, 587 F.2d 773, 776 (5th Cir. 1978), *cert. denied*, 444 U.S. 881, 100 S.Ct. 170 (1979).

Hansen was never shown at the hearing to have any advanced education, much less any formal medical, psychiatric or psychological training. Furthermore, Hansen, unlike the doctors, did not have the benefit of knowing Petitioner's medical history, or Petitioner's results on a battery of sophisticated tests. Hansen's own testimony is not without contradiction. At the hearing, Hansen stated that Petitioner said that he had the "female" government attorney wrapped around his finger. Nonetheless, Hansen's initial letter to the Assistant United States Attorney was captioned "Dear Sir." A proffer was also made in the record that had Dr. Butts been permitted to testify on rebuttal, he would have testified that Hansen had the reputation as a manipulator and "a snitch." That testimony should have been admitted and considered because it went directly to Hansen's credibility and was relevant. Furthermore, "a snitch" would have ample reason to testify against Petitioner merely to be moved to a different facility.

Finally, the unstated assumption in the district court's opinion seems to be that it is somehow to Petitioner's great benefit to be declared incompetent. This conclusion is hardly

self-evident, and courts have recognized that a determination that a defendant is incompetent is not necessarily of benefit to the defendant. *See, e.g., Brown* v. *Warden*, 682 F. 2d 348 (2d Cir. 1982), *cert. denied*, 459 U.S. 991, 103 S. Ct. 349 (1982). In many instances, confinement due to incompetency could exceed the term of imprisonment which the defendant would have served if he had been convicted of the crimes charged. *Id.* at 353. A commitment to a mental hospital may place the defendant in a situation "in which he is subjected to stricter custody, fewer privileges, and more unpleasant conditions that those to which he would be subjected to in an ordinary prison." *Id.* (citations omitted).

The case is also similar factually to *Wallace* v. *Kemp*, 757 F. 2d 1102 (11th Cir. 1985). In *Wallace*, the Court of Appeals for the Eleventh Circuit considered evidence that a defendant might have been feigning auditory hallucinations. *Id.* at 1109. The Court disposed of this contention quickly by stating that:

> Even if we assume that Wallace did not actually suffer from auditory hallucinations *the jury was still not justified in disregarding the expert opinions* [on the competency of the defendant] . . . *Whether Wallace heard phantom sounds is collateral to the crucial determinations that he suffered from a diagnosable mental impairment and was unable to understand and participate in his own defense. Id.* at 1109 (citation omitted; emphasis added).

The identical issue is presented here and the same conclusion follows: the district court was not justified in ignoring experts' opinions because it believed that Hager might be feigning his stuttering.

Regardless of the impact of an incompetency declaration by the district court, Petitioner had a right of constitutional dimension not to be tried while he was unable to assist his lawyer or understand the nature of the proceedings. *See*

Dusky, 362 U.S. at 402, 80 S.Ct. at 789. Based on the record before this Court, there is insufficient evidence that Petitioner was competent to stand trial when he was. The government presented insufficient evidence on the issue for the trial court to properly find Petitioner competent. The court of appeals applied an incorrect standard of review to the district court's determination, and improperly held that expert opinions on the issue of competency may be disregarded for no reason. For all of these reasons, this Court should issue a writ of certiorari.

II. THE DISTRICT COURT DENIED PETITIONER DUE PROCESS OF LAW BY NOT PROVIDING A FULL, FAIR AND MEANINGFUL COMPETENCY HEARING.

At the end of the cometency hearing, the district court stated that there would be further examinations of Petitioner. In effect, the district court continued the competency hearing in order that more evidence could be obtained on the issue of Petitioner's competency. Even in its memorandum regarding the competency of Petitioner to stand trial submitted after the hearing, the government argued that further evaluations of petitioner were necessary, and the government expressly recommended that the court appoint the Netcare Corporation to evaluate Petitioner's condition. Further, the government specially requested that the Netcare Corporation be advised as to the possiblity that Petitioner may have been feigning his symptoms. Similarly, because of the manner in which the district court ended the hearing, defense counsel fully expected to be able to present further evidence on the issue of whether Petitioner was faking his symptoms to the district court. In fact, Dr. Michael F. Hartings of Cincinnati Neurological Associates, Inc., a published expert on the detection of "faked" symptoms by criminal defendants, was contacted by defense counsel regarding an evaluation of Petitioner.

One of "the most fundamental requirements of due process is that an individual must receive adequate notice of the charges or claims being asserted against him." *United States* v. *Baker*, 807 F.2d 1315, 1323 (6th Cir. 1986). In *Baker*, the Court noted that:

> An example of the unfariness which might arise when proper notification is not given is Baker's assertion that he was not afforded a meaningful opportunity to rebut the government's proof regarding his potential for future dangerousness. It is essential that an individual be provided a meaningful opportunity to

> challenge the government's proof so that the committing court has the benefit of an adversary proceeding. *This includes being notified as to the nature of the government's evidence, as well as an opportunity to present witnesses on one's behalf. Id.* at 1323-24 (footnote omitted; emphasis added).

In this case, the government did not notify Petitioner prior to the competency hearing regarding the nature of the evidence it would present and, consequently, there was no opportunity to meaningful rebut that evidence or to introduce contrary evidence regarding the government's contention that Petitioner was faking his symptoms. The district court also considered material that was not presented at the hearing. There was no need to object or request a continuance because the district court specifically stated that there would be further opportunity to have Petitioner examined and, implicitly stated, a further opportunity to prevent evidence on his behalf. When the district court summarily decided the issue of competency, Petitioner was denied due process of law because he was never afforded any meaningful opportunity to rebut the government's contentions that he had "fooled" the doctors, or to contest the material which was never part of the record upon which the court relied.

When the district court relied on Petitioner's alleged status as a fugitive and information received from an individual named Ankerman, *see* Opinion and Order p. 15a, the district court denied Petitioner due process. Petitioner never had any opportunity to respond to this accusation because none of this material was before the court in the competency hearing. None of this material, therefore, was properly considered by the district court in determining whether the government met its burden of proving Hager competent to stand trial by a preponderance of the evidence. *See Connor* v. *Wingo*, 429 F.2d 630 (6th Cir. 1970), *cert. denied*, 430 U.S. 954, 97 S.Ct. 1779 (1972) (stating the burden of proof). This aspect of Petitioner's claim was completely ignored by the court of appeals.

The Seventh Circuit Court of Appeals has addressed this issue and held that:

> Our review of the trial decision's that no bona fide doubt existed as to petitioner's competency *is limited to consideration of the evidence before the court at the time of the decision*. *United States, ex rel. Foster* v. *DeRobertis*, 741 F.2d 1007, 1011 (7th Cir. 1984) (emphasis added), cert denied, 469 U.S. 1193, 105 S.Ct. 972 (1985).

An appellate court "will not search the record for post hoc rationalizations to support trial court orders." *United States* v. *Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985), n. 15.

A competency hearing is constitutionally required to be "a full, fair and meaningful competency hearing." *Martin* v. *Estelle*, 546 F.2d 177, 179 (5th Cir. 1977); *United States* v. *McCracken*, 488 F.2d 406, 424 (5th Cir. 1974). Here, Petitioner was evaluated by numerous medical experts who determined that Petitioner had suffered brain damage. Without any prior notice, the government presented lay testimony to the effect that this man, with an indeniable brain injury, was a consummate actor and was able to "fool" the experts. In such a situation, if the competency determination is to be truly meaningful, then the medical experts must be given an opportunity to reevaluate Petitioner with full knowledge of the government's evidence that Petitioner was merely faking the symptoms. Petitioner was denied any opportunity to present contrary evidence on his behalf regarding these contentions and no opportunity at all to confront or rebut the evidence not in record upon which the district court relied; therefore, he was denied a full, fair and meaningful hearing.

The language of the particular statutes at issue also mandates that it is only the evidence presented at the competency hearing that can be relied upon in making the competency determination. For example, 18 U.S.C. § 4241(d) clearly states that "*after the hearing*, the court finds by a

preponderance *of the evidence . . .*" on this issue of competency. (Emphasis added.) This language clearly indicates that the determination of competency is to be made from the evidence presented at the hearing. More important, 18 U.S.C. § 4247 provides that:

> At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing *shall be represented by counsel* and, if he is financially unable to obtain adequate representation, *counsel shall be appointed for him . . . .* The person *shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, to confront and cross-examine witnesses who appear at the hearing.* (Emphasis added.)

These procedural safeguards would be obviated if the district court were permitted to rely on "evidence" or "witnesses" who were not present at the hearing. Even civil commitment procedures are subject to constitutional limits of due process. *O'Connor* v. *Donaldson*, 422 U.S. 563, 580, 95 S.Ct. 2486, 2496 (1975) (Burger C.J., concurring). The district court violated Petitioner's rights by considering material not presented by the government at the competency hearing and by not giving Petitioner any opportunity to confront the evidence that he was merely feigning his symptoms.

A. THE ISSUE OF THE FAIRNESS OF THE COMPETENCY HEARING WAS NOT WAIVED BY PETITIONER'S FAILURE TO OBJECT.

The court of appeals held that the issue of whether the competency hearing was waived by Petitioner's failure to object to the district court's procedure. *Hager*, Slip Op. at 11. This decision cannot be supported by either the facts of the case or the applicable law. In its decision, the court of ap-

peals stated that if Petitioner "wished to assemble and present additional evidence as rebuttal . . . he was free to provide or describe such evidence in the supplemental post-hearing memoranda . . . ." *Id.* Such a decision permits "evidence" to be submitted to the district court outside of the hearing and is a procedure which is incompatible with any notion of due process of law. As the foregoing discussion has demonstrated, it is only the evidence presented at the competency hearing which can be relied upon by the district court. The precise holding of the court of appeals was that "absent contemporaneous objection, the district court's actions in relying upon the evidence adduced at the hearing *and in the post-hearing memoranda* did not violate due process." Slip Op. at 11-12 (emphasis added). Such a decision is clearly contrary to law.

Just as important is the fact that the district court stated that Petitioner would be evaluated by additional medical professionals. It must be remembered that until the hearing actually began there was no indication that the government was intending to accuse Petitioner of faking his disability, and all of the expert medical testimony, presented by the government's own experts, was that Petitioner was incompetent to stand trial. Moreover, it was not until the district court rendered its decision that the parties learned that the district court intended to rely on matters outside the record of the competency hearing. There was, therefore, no opportunity to object to the reliance on those matters because the first indication did not appear until the decision issued.

Thus, the court of appeals apparently felt that some form of "objection" was required to preserve this issue for review. This decision revives the discredited practice of requiring exceptions to unfavorable rulings, which has been eliminated by both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. *See* Fed. R. Civ. P. 46; Fed. R. Crim. P. 51. In this case, a proper motion for a determination of competency was made, and Petitioner had a right of constitutional dimension to have the issue of competency deter-

mined properly. No objection or exception to the district court ruling was necessary to properly preserve this issue for review.

Furthermore, there simply was no opportunity to object to the district court's decision to consider things outside the record. Again, both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure provide that "if a party has no opportunity to object to a ruling or order . . . the absence of an objection does not thereafter prejudice the party." Fed. R. Civ. P. 46; Fed. R. Crim. Pro. 51. The rules promulgated by the Supreme Court are "as binding as any statute duly enacted by Congress, and the federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 108 S.Ct. 2369, 2374 (1988).

B. THE COURT OF APPEALS ERRED BY NOT CONSIDERING THE ISSUE OF THE FAIRNESS OF THE COMPETENCY HEARING UNDER THE PLAIN ERROR DOCTRINE.

Both Rule 52 of the Federal Rules of Criminal Procedure and Rule 103 of the Federal Rules of Evidence permit a court of appeals to take notice of plain errors which affect "substantial rights." For example, the Court of Appeals for the Sixth Circuit has held that a prosecutor's comments on the defendant's failure to testify were plain error because they violated the defendant's constitutional right not to testify. *United States* v. *Robinson*, 794 F.2d 1132, 1135-36 (6th Cir. 1986), *reversed on other grounds*, 485 U.S. 25, 108 S.Ct. 864 (1988). The court of appeals held under these circumstances the prosecutor's error was not harmless because it "jeopardized the fairness of the trial." *See also United States* v. *Williams*, 665 F.2d 107 (6th Cir. 1981) (holding that a violation of a defendant's due process rights can rise to the level of plain er-

ror); and *United States* v. *Jones*, 647 F.2d 696 (6th Cir. 1981), *cert. denied*, 454 U.S. 898, 102 S.Ct. 399 (1981) (holding that a jury instruction that impermissibly amends an indictment is plain error). Nonetheless, in this case the court of appeals did not review the substantive issue claimed as plain error in this case.

The claim presented is clearly rooted in the Fifth Amendment to the United States Constitution. *Drope* v. *Missouri*, 420 U.S. 162, 95 S.Ct. 896 (1975). "[B]efore a federal constitutional error can be harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 21-22, 87 S.Ct. 824 (1967). The standard of review in such cases was formulated by this Court in *Kotteakos* v. *United States*, 328 U.S. 750, 764-65, 66 S.Ct. 1239, 1248 (1946), when it held that:

> If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that *the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.* The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand. (Citations omitted; footnote omitted; emphasis added.)

An error that implicates a significant due process right, which is guaranteed by the Fifth Amendment to the United States Constitution, can only affect a substantial right of a criminal defendant. Claims that implicate due process ques-

tions may be considered by a reviewing court even if raised for the first time on appeal. *Gomes* v. *Williams*, 420 F.2d 1364, 1367 (10th Cir. 1970). Therefore, the court of appeals should have considered the substantial issue raised by Petitioiner under a plain error theory if the court was to guarantee Petitioner a substantial constitutional right.

The court of appeals erred in holding that Petitioner wavied his claim to the fairness of the hearing by failing to object. The procedure followed by the district court was not a full, fair or meaningful competency hearing. In any event, this Court must grant the writ of certiorari in order to ensure that the court of appeals will review claims of error of constitutional dimension under the doctrine of plain error. Unless this result is reviewed, this case will stand as precedent for permitting waiver of substantial fundamental and express constitutional rights without making any determination of whether the violation of those rights occurred.

CONCLUSION

For all the foregoing reasons, and to insure the guarantee of due process of law in the Fifth Amendment to the United States Constitution, Petitioner James F. Hager requests that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,



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APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be *prominently* displayed if this decision is reproduced.

No. 90-4110

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES F. HAGER,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Ohio.

(Filed June 21, 1991)

Before: GUY and RYAN, Circuit Judges; and JOINER, Senior District Judge.*

RYAN, Circuit Judge. James F. Hager appeals his conviction for various crimes related to drug trafficking. The issues are 1) whether the district court's fact finding that Hager was

* The Honorable Charles W. Joiner, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

competent to stand trial is clearly erroneous; and 2) whether the district court violated Hager's due process rights by finding Hager competent after a hearing in which the government allegedly called surprise witnesses.

Concluding that the district court did not commit clear error in finding Hager competent, and that the hearing met the requirements of due process, we affirm.

I.

On December 19, 1985, a federal grand jury indicted Hager on various charges related to drug trafficking. According to the government, Hager eluded authorities until his arrest on April 24, 1989. In June 1989, Hager filed a motion requesting a determination of whether he was competent to stand trial in view of a skull injury he sustained that month. The district court ordered Hager to undergo psychological evaluation at a Springfield, Missouri, federal medical facility. After Hager arrived at the facility, another inmate struck him on the head with a mop handle. A staff psychologist reported that Hager was incompetent to stand trial, and the district court granted the parties' joint motion requesting the court to order a second evaluation at the facility. After the second evaluation, Dr. Donald Butts, M.D., a staff psychiatrist with at least fourteen years' experience in forensic psychiatry, reported that Hager remained incompetent to stand trial.

At the ensuing competency hearing, Dr. Butts testified that in evaluating Hager's mental condition, he considered the impressions of other center staff coming into contact with Hager, results of a neurological workup limited to physical pathology, the Halstead-Reitan battery of psychological tests, a separate battery of different psychological tests, an electroencephalogram, conclusions of a neurological consultant, a computerized axial tomography (CAT) brain scan, as well as Butts' own "mental status evaluation in serial installments, [25 to 30] serial interviews." According to Dr. Butts, Hager fell into the severely impaired range under the "state of the

art" Halstead-Reitan test, which addresses "physical involvement involving psychological processes."

However, staff administered the Halstead-Reitan test, and perhaps several of the other tests, during Hager's *first* visit to the center, so that the test did not reflect any improvement occurring after Hager's first visit. An E.E.G. taken during the *second* visit produced normal results.

One of the brain scans taken on the first visit revealed "a left posterior parietal linear skull fracture with a contused brain, intracerebral hematoma, and a minor midline shift of brain structures, and a suggestion of mass effect." Dr. Butts explained:

> [I]n a linear, i.e. a straight line on the left side of the skull, there is a fracture of the bone, and the underlining soft tissues were torn and contused and a large blood clot had developed as a result of a leaking ruptured vessel; and this, since the skull is a rigid unyielding container, the soft tissues, due to the incursion of the hematoma, the blood clot, the other soft tissues were pushed out of the way into positions that were not anatomically correct, and it exerted pressure on the other brain structures.
>
> * * *
>
> It is by definition a brain injury.

While such brain injuries can cause a variety of physical symptoms, Hager suffered only a few of these symptoms. His physical symptoms included at least intermittent stuttering, staggering and unsteady gait, and overly tight muscles in his right arm and leg. According to Dr. Butts, it is "almost invariably true" that brain damage affecting physical functioning in this manner will also affect psychological functioning, because "the same area of the brain performs several functions." Dr. Butts described Hager as having no "demonstrated ability to pick up on abstract concepts, such as other than literal mean[ing]s of words." In Dr. Butts' view, Hager's symptoms were "classical . . . textbook symptoms . . . and

believable." On the other hand, Butts knew that two individuals reported hearing Hager speaking on the telephone without stuttering.

Dr. Butts believed that Hager would not be able to "tend to the requirements of everyday living on his own." "[H]e might lack the cognitive ability [to] decide what was in his best interest at a critical moment, like not to cross the street in front of that truck . . . ." On the issue of memory loss, Dr. Butts testified:

> His memory is one of his principal demonstrated areas of pathology . . . . I divide memory into immediate, short-term, intermediate and chronic memory. His difficulties are in the more immediate memory, shorter term memory; his memory for things that happened a long time ago is relatively intact. Things that happen intermediately, for instance, like in the last six months or something like that, he's very spotty about that. He remembers some things; some things not at all. The short-term memory having to do with the past day or so, he has a lot of problems with; and the things that are immediate, like, for instance, "What did you have for breakfast at 7:00," may not be retained until evening.
>
> So this is sort of a graduation. The shorter term, the more the loss, but things that were imprinted prior to the injury are still large largely there.

Addressing Hager's ability to function in a trial setting, Dr. Butts opined:

> I have approached him, and others at our facility have an approached him on this and similar topics, and it is our opinion . . . that he does not have the ability to follow through with that [listening to and comprehending testimony of others]. He does not have the ability to perform at that level.
>
> . . . .

> [H]e would not do well; he would probably deteriorate on the stand. He knows the role and function of the major persons in the courtroom; but beyond that, loses the integrative qualification of what they do with each other. I think that were he on the witness stand, that you would see a person who was very halting in their cerebration; there would be a great delay in the procedures, to the point where you may not be able to proceed with the tempo of a court dynamic. I think that he would have to be led and positioned in order to even know where he was supposed to be at that point.
>
> . . .
>
> [H]is major concerns [in conferring with counsel] would probably be along the lines of circumstances of his physical comfort or lack of such in various facilities where he was incarcerated. [T]he sublties [sic] of the details of his charges would be accessible, nor the consequences of, the expected consequences of such.
>
> . . .
>
> I do not feel that he is competent to proceed . . . .

According to Dr. Butts, Hager's condition had not significantly improved or deteriorated between the first and second evaluations. "[Y]ou might see a gradual betterment, but that's completely unpredictable." Acknowledging some possibility that Hager was "faking" his symptoms, Dr. Butts stated his belief that Hager's physical and psychological difficulties were genuine.

Hager's sister testified that Hager stuttered a great deal and that his thought processes were disjointed. However, another witness at the hearing, a United States Marshal, testified that Hager did not stutter for a short period of time during a trip from the medical facility to a Columbus, Ohio, jail. Scott Hansen, a mentally competent federal prisoner working as an orderly at the facility, testified that Hager deliberately stuttered only when a medical staff member or an inmate other

than Hansen was present. Hansen also testified that he became friends with Hager, whom he saw on a daily basis, and that Hager revealed his intentions to convince Dr. Butts, and the rest of the medical staff, that he was incompetent to stand trial. According to Hansen, Hager requested Hansen to prompt him if he forgot to stutter, and Hager discussed staging a "seizure" in order to further convince the psychiatrists of his medical and/or psychological difficulties.

Hansen further testified that Hager claimed to have some gold and silver stored away, and that he periodically checked the library's *Wall Street Journal* for the most recent gold and silver prices. Hansen also recalled Hager's relating that he faced "enormous amounts" of prison time if convicted of charges relating to his distribution of marijuana transported from Arizona, Colorado, Texas, and Mexico. According to Hansen, Hager also stated that authorities had charged his wife with aiding and abetting the distribution, and that his brother-in-law was responsible for Hager's indictment. All this information concerning Hager's past and possible future proved accurate.

Hansen recalled that Hager correctly named the prosecuting attorney in his case and stated that he and his attorneys had her wrapped around their finger. According to Hansen, Hager also referred to his acquaintance, David Denner, who administered psychiatric rehabilitation programs for the Ohio Department of Mental Health. Hansen testified:

> From what he told me, Mr. Denner, David Denner, is an . . . official with the Mental Health Services for the State of Ohio, and that what his defense attorneys were going to try to do is get the Court to find Jim incompetent to stand trial, and try to move him into a state facility or a private facility, which if it was a state facility, David Denner could then have state doctors examine him and show that the injuries that he had received were permanent injuries and that he could never — would never ever be able to stand trial, be competent to; and that, therefore, they would

move for the Government to dismiss the charges that were against him.

Finally, Hansen recounted that Hager arranged for Denner to transfer $2500 of Hager's funds to Hansen, allegedly as a "loan" to enable Hansen to attend his mother's funeral in Toledo. Hansen never attended the funeral, and the center placed the funds in a commissary account for Hansen. He eventually spent the $2500 on commissary items, some of which may have been for Hager's benefit. Denner testified that he understood that the money was for the funeral of Hansen's father, not his *mother*. One of Hager's relatives sent Hansen $50.00, allegedly for a pair of gym shoes.

At the close of the hearing, the district court stated, I want counsel on both sides to submit a memorandum telling the Court what they have proved here this morning . . . . I'm going to tell you I am going to submit this defendant to further psychiatric examination. I will keep counsel well advised . . . ." After the parties filed the requested memornda, the district court issued an order declaring Hager competent to stand trial.

In the district court's view, Hager was "simply faking his condition" and stuttered "only when . . . being observed." The court noted that Hager might be able to "control his stuttering, act as if his arm is impaired, and intentionally and selectively mislead others into believing he is experiencing memory loss." The court also asserted that objective tests demonstrated that Hager was improving and that his blood clot had dissolved. Of course, the court relied heavily upon Hansen's testimony in concluding that Hager fabricated symptoms in order to deceive Dr. Butts.

Hager appealed the district court's order declaring him competent, but the Sixth Circuit dismissed the appeal on the ground that the declaration was not a final appealable order. The parties then entered into a stipulation under which the government dismissed several counts of the indictment without prejudice. Following a bench trial, the district court found Hager guilty of the remaining counts. The court im-

posed a twelve-year sentence, two five-year sentences to run concurrently with the twelve-year sentence, and two years' supervised release.

Contending that he was incompetent to stand trial and that the government failed to provide adequate notice that it would call several lay witnesses at the competence hearing, Hager appeals.

II.

A.

Hager claims that mental and psychological complications resulting from his brain injury left him unable to effectively assist with his own defense at trial.

Subjecting a defendant to trial while the defendant is legally incompetent violates the defendant's due process rights. *Drope* v. *Missouri*, 420 U.S. 162, 171 (1974); *Owens* v. *Sowders*, 661 F.2d 584, 585 (6th Cir. 1981); *United States* v. *White*, 887 F.2d 705, 708 (6th Cir. 1989). The relevant inquiry is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as a factual understanding of the proceedings against him." *Dusky* v. *United States*, 362 U.S. 402 (1960); *Penry* v. *Lynaugh*, 492 U.S. 302, 333 (1989). In other words, competence entails "the capacity to understand the nature and object of the proceedings . . . , to consult with counsel, and to assist in preparing [a] defense . . . ." *Drope*, 420 U.S. at 171. A federal district court's determination that a defendant is competent to stand trial is a finding of fact, which we review only for clear error. *United States* v. *Shepard*, 538 F.2d 107, 110 (6th Cir. 1976); *United States* v. *Sanzo*, 842 F.2d 333 (6th Cir. 1988) (unpublished decision).

The district court heard considerable evidence indicating that Hager, rather than muddling along as the confused victim of an unremitting cerebral impairment, artfully attempted to deceive Dr. Butts, the federal prosecutor, and the district court into believing that Hager was unable to effec-

tively participate in trial proceedings. Hansen's testimony, plainly credited by the district court, indicated that Hager fabricated symptoms in order to convince the medical center staff that he suffered from physical and psychological impairments as a result of the June 1989 blow to his head. Hansen's testimony also indicated that Hager could both 1) anticipate the possibility of incarceration in his future, and 2) recall details of his criminal past, including his wife's and brother-in-law's roles.

Dr. Butts' testimony certainly tends to show that Hager sustained pronounced cerebral injury capable of causing the physical and severe psychological impairments that he appeared to exhibit. However, Dr. Butts' testimony also indicated that even victims of such pronounced injuries can recover, at least partially, over time. Moreover, the physical and psychological symptoms that Hager exhibited were susceptible of fabrication. A person can stutter, stagger, and stiffen his extremities at will, and Dr. Butts necessarily relied upon Hager's own self-serving assertions in determining that Hager suffered from confusion and memory loss. Thus Dr. Butts' testimony does not leave us with the firm conviction that the district court was mistaken in disagreeing with his assessment that Hager was legally incompetent.

Accordingly, we conclude that the district court's fact finding that Hager was competent to stand trial is not clearly erroneous.

B.

Hager alleges that the district court violated due process by denying him a full and fair hearing concerning his alleged incompetence. Specifically, Hager complains that the government failed to give adequate notice of its intention to call the several lay witnesses who discredited Hager's appearance of incompetence. However, the record does not reveal that Hager either objected on these grounds at the hearing or requested a continuance.

The district court's prediction that the court would solicit

and evaluate additional psychological evaluations does not excuse Hager's failure to object. If Hager wished to assemble and present additional evidence as rebuttal to the allegedly unexpected testimony of the government witnesses, he was free to provide or describe such evidence in the supplemental post-hearing memoranda that the district court consulted prior to rendering its final decision.

Thus, we conclude that absent contemporaneous objection, the district court's actions in relying upon the evidence adduced at the hearing and in the post-hearing memoranda did not offend due process.

III.

For the foregoing reasons, Hager's conviction is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. CR-2-85-0136

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES F. HAGER,

Defendant.

OPINION AND ORDER
(Filed May 15, 1990)

This matter comes before the Court to consider the mental competency of the defendant, James F. Hager, to stand trial in the above-captioned case. 18 U.S.C. § 4241 (1988). For reasons set forth below, the Court finds the defendant to be competent to stand trial.

On June 1989, counsel for the defendant filed a motion for a determination of competency following the defendant's involvement in an altercation at the Franklin County Jail. Hager was injured and subsequently hospitalized as a result of a blow to the head. This Court ordered that Hager be sent to the United States Medical Center for Federal Prisoners at Springfield, Missouri for examination pursuant to section 4241.

The staff at the Springfield facility submitted a report on September 6, 1989 stating that the defendant was, at that time, incompetent to stand trial. Upon the filing of a joint motion by both parties, the Court ordered further hospitalization of the defendant for four months at the Springfield Medical Center pursuant to section 4241(d).

On March 5, 1990, the Court held a hearing on this matter. Dr. Donald Butts, a staff psychiatrist with the Department of

Justice, Federal Prison System, in Springfield, Missouri, testified that in his professional opinion the defendant is incompetent to stand trial. Transcript of Competency Hearing at 30 ("Transcript"). Specifically, Dr. Butts concluded that the defendant lacks the ability to listen and comprehend the testimony of any witnesses produced at trial; is only able to take the witness stand and testify on his own behalf in a limited manner; and can only assist his counsel in a very rudimentary fashion. *Id.* at 28-29. The government argued, in opposition, that the defendant is simulating only the characteristics of a individual suffering from some type of mental impairment and that he is, in fact, faking his condition in order to avoid be tried for his alleged crimes.

It is well settled that the test for determining the competency of a criminal defendant to stand trial is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky* v. *United States*, 362 U.S. 402, 402 (1960) (per curiam) (quoting the Solicitor General); *see Williams* v. *Bordenkircher*, 696 F.2d 464, 466 (6th Cir.), *cert. denied*, 461 U.S. 916 (1983); *Owens* v. *Sowders*, 661 F.2d 584, 585 (6th Cir. 1981).[1] The Court finds that the defendant possesses the ability to effectively assist his counsel in the preparation of his defense and understands the nature of this criminal proceeding since he is not presently suffering from any mental illness. The defendant is simply faking his condition as a means of avoiding the consequences of his alleged criminal activity.

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[1] This standard is codified in section 18 U.S.C. § 4241(d):

> If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mental incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General.

There is no claim by the defendant that he suffered from any psychological problems prior to the June 1989 altercation. It is clear the defendant did sustain a blow to the head in June 1989. Dr. Butts testified that the type of blow to the head that the defendant received can result in brain damage, with the physical manifestations being: (1) paralysis; (2) asymmetry of facial muscles; (3) respiratory problems; (4) speech impairments; (5) vision impairments; and (6) hearing impairments. Transcript at 14. Of these six physical impairments, Hager only suffers from some degree of "spasticity" in his right arm and stuttering.

As the government correctly states, the physical complications allegedly suffered by Hager are within his control. Indeed, there is evidence strongly suggesting the defendant stutters only when he is being observed. First, Robert Obenour, a United States Marshall, noticed that the defendant did not stutter for a short period of time during the course of being transported from the Springfield facility to the Franklin County Jail in Columbus, Ohio. *Id.* 63-64. Furthermore, Dr. Butts conceded on cross-examination that at least two individuals had informed him that they had overheard the defendant speaking on the phone without stuttering. *Id.* at 40. Finally, Scott Hansen, a federal prisoner, testified that Hager stuttered in front of the Springfield staff and other inmates in an effort to misrepresent to the staff psychiatrist his actual condition. *Id.* at 83; *see infra* p. 5.

Although Dr. Butts stated that in his opinion Hager was not faking his condition, he did admit it was a possibility. The factors considered by Dr. Butts in reaching his conclusion as to the defendant's mental state are again primarily within the defendant's control. The defendant can control his stuttering, act as if hs arm is impaired, and intentionally and selectively mislead others in to believing he is experiencing memory loss. *See* Transcript at 48. The government also notes that the objective testing administered by the Springfield staff demonstrates improvement on the part of Hager since the original injury. Hager's E.E.G. is considerd normal. *Id.* at 46. The blood clot resulting from his head injury has dis-

solved. Given that the results of objective testing suggest improvement and that Dr. Butts' observations are based on conduct within the defendant's control, it is certainly possible that Hager "fooled" Dr. Butts. Moreover, as discussed below, there is evidence indicating Hager intended to fake certain symptoms in order to deceive Dr. Butts.

At the hearing, the government offered the testimony of Scott Hansen, a federal prisoner serving as an orderly in the work cadre unit at the Springfield facility. Hansen testified that he became friends with the defendant and that they spent time together on a daily basis. According to Hansen, Hager confided in him his plan to have himself declared mentally incompetent as a means to avoid his criminal trial and possible incarceration. *Id.* at 82; *see, e.g., United States* v. *Birdsell*, 775 F.2d 645, 650-51 (5th Cir. 1985), *cert. denied*, 476 U.S. 1119 (1986). Hager even solicited Hasen's cooperation in executing this plan by requesting Hansen to inform him if he, Hager, stopped stuttering around other people. *Id.* at 83. Hansen also stated that Hager only stuttered when a staff member or other inmates were present. *Id.*

Hansen also described a number of other events suggesting Hansen is faking his condition. For example, when the two went to the library, Hager would check the *Wall Street Journal* for the current gold and silver prices. Hansen testified that the defendant informed him that he had hidden a substantial amount of gold and silver and that he monitored the market price. *Id.* at 73. Additionally, Hansen stated that Hager told him details about his pending criminal charges, including the fact that the marijuana Hager was distributing was from Mexico and Arizona and that his brother-in-law is the reason he was indicted. *Id.* at 80-81. Further, Hager also related to Hansen that he, Hager, was facing enormous "amount of time" in prison if convicted of the crimes charged in the indictment. *Id.* at 84.

As the government correctly observes, the information Hager provided to Hansen serves as the basis for the charges contained in the indictment. The details of the alleged con-

spiracy and the cooperation of Hager's brother-in-law, Gary Ankerman, were made known to the Court at Ankerman's plea and sentencing.

Finally, Hansen testified that Hager made arrangements for a friend of his, David Denner, to send Hansen $2,500 so that Hansen could attend his mother's funeral. *Id.* at 75. This financial transaction suggests that at least Hager's friend, Denner, considered him competent. Denner, who had never met Hansen personally, sent Hansen $2,500 at Hager's request. *Id.* at 99, 100. If Denner did indeed consider Hager incompetent, logic suggests that he should have been hesitant to send such a sizeable amount of money to a total stranger — more importantly a federal prisoner. This transaction also supports the credibility of Hansen as a witness. The defendant contends that Hansen manipulated him in obtaining the monies from Denner. If this was true, however, why would Hansen forfeit the opportunity to exploit Hager for future funds by testifying against him? Hansen's credibility is buttressed further by the fact he has made no requests for special treatment, such a reduction in his sentence or money, for his testimony. *Id.* at 86.

The defendant has attempted to elude law enforcement officials for a number of years. His previous status as a fugitive, and the length of time in which the defendant did successfully elude the authorities, is indicative of the defendant's ability to devise and engineer elaborate schemes to avoid his apprehension. The Court is convinced that the defendant's alleged condition is an illustration as to what lengths the defendant will go to skirt the out-reached arms of the law.

WHEREUPON, upon consideration and being duly advised, the Court finds by a preponderance of the evidence that the defendant Hager is competent to stand trial.

IT IS SO ORDERED.

/s/ JOSEPH P. KINNEARY
UNITED STATES DISTRICT JUDGE

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
UNITED STATES MEDICAL CENTER FOR
FEDERAL PRISONS
Springfield, Missouri

FINAL FORENSIC REPORT

HAGER, James Reg. No. 01609-196 August 30, 1989

INDENTIFICATION AND REASON FOR REFERRAL:

Mr. James Hager is a 38-year-old Caucasian male referred to the Medical Center for Federal Prisoners under provisions of Title 18, U.S. Code, Section 4241, from the United States District Court for the Southern District of Ohio, Eastern Division. In that jurisdiction, the patient is facing a number of charges alleging that he was involved in a conspiracy to distribute a controlled substance. The referring court is interested in receiving an opinion whether Mr. Hager is presently competent to stand trial.

Prior to commencing the evaluation process, Mr. Hager was instructed by the undersigned examiner that he was being evaluated pursuant to a Court Order from United States District Judge Joseph P. Kinneary. The patient was instructed that the purpose of the evaluation was to assist the court in its determination of whether he was competent to stand trial. Mr. Hager was instructed that confidentiality would not be in effect and that ultimately a report would be prepared and submitted to the referring court. Mr. Hager appeared to understand this explanation and agreed to proceed with the evaluation process.

BASIS OF FINDINGS:

Mr. Hager was evaluated in the Mental Health Evaluation Service of the Medical Center for Federal Prisoners. He arrived at the Medical Center on July 10, 1989, and his evaluation at this facility was completed on August 16, 1989. The patient was interviewed on a number of occasions during the

course of his study at this facility. In addition, the patient was administered an assortment of psychological and neuropsychological tests. The patient's behavior was observed and documented by an assortment of nursing and correctional staff. Mr. Hager was also evaluated by medical staff as part of the evaluation process. A letter was received from Assistant United States Attorney Robyn R. Jones summarized the case against Mr. Hager. Also provided was a copy of the indictment. The undersigned examiner had occasion to review various medical records which were received from the Doctor's Hospital in Columbus, Ohio. The medical records summarized the patient's medical condition after he was assaulted in a jail facility in Ohio.

BACKGROUND INFORMATION:

The following background information was obtained solely from the patient. Mr. Hager indicated that he was born on November 18, 1950. He had one brother and two sisters and grew up in Ohio. The patient indicated his father was a farmer. Mr. Hager graduated from high school. He described himself as being an above average student. Mr. Hager attended Ohio State University and majored in agriculture. The patient indicated he did not graduate from college but came close to completing the necessary requirements for an undergraduate degree. After leaving college, Mr. Hager stated that he returned to work with his father on a farm. He married in 1968. A child was born to that union. The patient indicated his first marriage ended in divorce and he remarried in 1981. No children were born to that marriage. The patient stated that he had a small farm and was involved in grain farming. He admitted to one prior arrest, stating he was charged with some type of marijuana violation.

Mr. Hager indicated that he started smoking marijuana in college. He indicated that during one stint in college he smoked on a daily basis. After leaving school, he smoked marijuana a few times per week. The patient recounted that he worked remodeling homes to supplement his farm income.

The patient stated that he was arrested in Arizona with his wife but could not recount why he was in Arizona. Likewise, the patient could not remember being returned to Ohio. The patient indicated that while in a jail in Ohio he had a head injury as the result of an assault by another inmate. The patient indicated that the alleged assault occurred about one month prior to his arrival at the Medical Center.

INTERVIEW IMPRESSIONS:

When questioned, the patient demonstrated some hesitation in his speech. He complained of memory problems along with headaches. The patient stated that he had difficulty concentrating and experienced some dizziness. The patient denied any seizure activity or muscular weakness subsequent to the assault. Mr. Hager denied any prior history of mental problems. He denied ever receiving any inpatient or outpatient treatment for psychological problems. When initially interviewed, the patient also complained of having crying spells. At times during the initial interview, he did in fact become tearful. The patient was oriented with respect to time, place, person, and situation. He displayed no delusional ideation. He denied being troubled by any auditory or visual hallucinations.

The initial impression was that Mr. Hager most probably was demonstrating various organic impairments as a result of being assaulted in jail.

HOSPITAL COURSE:

After the initial interview with Mr. Hager by the undersigned examiner, the patient was allowed to co-mingle with other patients on the ward. Over the next two days, the patient continued to complain of headaches. The patient was interviewed further concerning his recollections both before and after the assault. Mr. Hager reported that after finally gaining consciousness he had no recollection of his wife or what she looked like. The patient described having difficulty recalling dates at that time such as his birthday. He indicated that

at that time he experienced some difficulty with his balance and had marked articulation problems. Mr. Hager stated that prior to the injury he had no difficulties with his speech. In addition, Mr. Hager stated that he had difficulty structuring his sentences at times. Mr. Hager indicated that he was very sad and more depressed than he had been in the past. The patient also stated that he had some difficulty hearing following the accident. The patient requested reassurances and hoped that many of his difficulties would resolve.

On July 23, a mentally disturbed inmate on the ward hit Mr. Hager on the head with a broomstick. The disturbed patient believed that Mr. Hager had been making statements on the ward that the patient was a homosexual. Mr. Hager was transferred to the medical ward where he remained for four days. During that time period, he was alert and responsive and did not appear significantly different than his presentation upon arriving at the Medical Center. Mr. Hager was subsequently returned to the forensic ward where he underwent a series of neuropsychological tests. The patient continued to complain of headaches. His affect was labile. He described mood swings between being very depressed and anxious and at other times having a normal mood. In general, he described feeling depressed and admitted to crying spells. The patient also described tiring easily. The patient indicated that he was anxious while being around other people because he feared another assault.

As part of the patient's evaluation at this facility, Mr. Hager underwent a number of medical tests. Following the assault at the Medical Center, an x-ray was completed of the patient's head. He was reported as having "no acute bony abnormalities." No changes were noted from the x-ray which was taken upon the patient's arrival at the Medical Center. Mr. Hager had a neurological evaluation completed by George H. Klinkerfuss, M.D., Neurology Consultant. The neurologist's impression was that Mr. Hager had suffered a significant head injury and was in need of medical follow-up, including speech therapy, special increase in endurance exer-

cises, and continued administration of Tylenol for headaches. An audiological examination was also completed since the patient reported some hearing loss following his initial assault. The consulting clinical audiologist reported that the patient had bilateral higher frequency sensorineural impairments.

On August 16, 1989, the patient had his final staffing. At that time, the existing data base was reviewed and a diagnostic and forensic formulation occurred in preparation for submitting a report to the referring court.

PSYCHOLOGICAL AND NEUROPSYCHOLOGICAL TEST RESULTS:

To assess Mr. Hager's present intellectual functioning, he was individually administered the Wechsler Adult Intelligence Scale-Revised. The patient received a Verbal Intelligence Quotient of 93, a Performance Intelligence Quotient of 95, and a Full Scale Intelligence Quotient of 94, which placed his current level of intellectual functioning within the Average range. The patient's performance across all of the subtests was not consistent. The patient's performance on a test measuring immediate auditory memory was significantly below his performance level on the other subtests. The patient also had difficulty on a subtest of arithmetic abilities. The patient's recent brain trauma may have interfered with the concentration necessary for him to perform better on this test. The patient also performed poorly on a subtest involving visual memory. This subtest is also very sensitive in detecting brain dysfunction. To further assess the patient's memory, Mr. Hager was individually administered the Wechsler Memory Scale-Revised Various aspects of memory were assessed including verbal memory, visual memory, general memory, and attention/concentration and each was below average. To further assess the patient's neuropsychological status, the patient was administered the Halstead-Reitan Neuropsychological Test Battery. The patient received an impairment index of .86, which fell in the severly impaired

range. Results of the neuropsychological test battery suggested the presence of bilateral organic impirment.

To assess Mr. Hager's personality functioning, he was administered the Minnesota Multiphasic Personality Inventory. The configuration of the validity scales on this test suggested that the derived personality profile was valid and interpretable. It did not appear that the patient consciously sought to misrepresent his personality functioning in the manner he completed this test. The patient's highest elevation on the personality profile occurred on the depression scale. The obtained test results suggested that Mr. Hager is likely to feel very unhappy and depressed much of the time and lacks energy to cope with the problems of everyday life. In addition, he is likely to experience anxiety and tension much of the time and have difficulty concentrating. Test results gave the impression that he may have crying spells and feel ineffective. The test results suggested the likelihood of the patient ruminating and brooding over his present difficulties. His efforts to work through his problems are ineffective for the most part. He may also entertain concern about losing further control.

CASE FORMULATION:

Mr. James Hager is a 38-year-old Caucasian male referred to the Medical Center for Federal Prisoners under provisions of Title 18, U.S. Code, Section 4241 from the United States District Court for the Southern District of Ohio, Eastern Division. In that jurisdiction, the patient is charged with a number of counts of Possession with Intent to Distribute Marijuana. The referring court is interested in receiving an opinion whether Mr. Hager is presently competent to stand trial. The patient's early developmental history was not remarkable. The patient is a high school graduate who came close to graduating from Ohio State University. The patient denied any prior history of psychological or psychiatric difficulties. He denied ever receiving any inpatient or outpatient treatment in the past. During this year, Mr. Hager was

assaulted in jail in Columbus, Ohio. He was immediately hospitalized in Columbus, Ohio, prior to the recommendation being made that he needed evaluation of his competency to stand trial. The current evaluation indicated that Mr. Hager presently has a variety of psychological problems that appear attributable to his head trauma. The patient has problems with both his long- and short-term memory. The patient's abstract thinking is impaired. In addition, he displays evidence of disturbance of higher cortical functioning. The patient has difficulty concentrating and attending for extended periods of time. His affect is labile. Mr. Hager's mood is depressed and anxious. Prior to his transfer from the Medical Center, a noticeable increase in his anxiety level was evident as he worried about returning to the jail facility in Ohio.

DIAGNOSTIC IMPESSIONS:

Axis I: Dementia.

PROGNOSIS:

It is unlikely that Mr. Hager would demonstrate any rapid improvement in his cognitive functioning. It is possible, however, that gradually over time improvement may occur. Despite Mr. Hager's depressed mood, he denied being suicidal and did not impress the examiner as representing an imminent suicide threat.

DISCUSSION AND OPINION CONCERNING COMPETENCY TO STAND TRIAL:

Various symptoms associated with Mr. Hager's present mental defect have an adverse effect on his competency to stand trial. The patient's memory is incomplete and he would be unable to assist an attorney in recollecting occurrences during the time frame summarized in the indictment. Beyond the patient's memory difficulties, however, the patient would have difficulty adequately attending and concentrating on legal proceedings.

In the opinion of the undersigned examiner, Mr. Hager is presently incompetent to stand trial. In the opinion of the undersigned examiner, due to the patient's current mental defect, he is currently unable to adequately assist an attorney in preparing a rational defense.

/s/ DAVID L. REUTERFORS, Ph.D.
Staff Psychologist

PD
t: 08-31-89

UNITED STATES DEPARTMENT OF JUSTICE
BUREAU OF PRISONS
UNITED STATES MEDICAL CENTER FOR
FEDERAL PRISONS
Springfield, Missouri

FINAL FORENSIC REPORT

HAGER, JAMES REG. NO: 01609-169 JANUARY 16, 1990

INDENTIFICATION AND REASON FOR REFERRAL:

This was the second admission to the U.S. Medical Center for Federal Prisoners for this thirty-eight year old, married, caucasian male. Mr. Hager was admitted under provisions of Title 18, U.S.C. Section 4241(d), from the U.S. District Court for the Southern District of Ohio, Eastern Division. The patient had previously been evaluated at this facility under Title 18, U.S.C. Section 4241, and a report was submitted by Dr. David I. Reuterfors, referring to Mr. Hager's competency. He was returned to this facility to determine if in the foreseeable future he could regain competency to proceed with his trial as a result of treatment.

Mr. Hager originally arrived at this facility on 07-10-89, and his evaluation was completed on 08-16-89. He arrived back at our facility for his second admission on 09-30-89, and returned to court on 01-10-90.

PRESENT OFFENSE:

The patient is charged with a number of offenses alleging that he was involved in a conspiracy to distribute a controlled substance, specifically, marijuana.

BACKGROUND INFORMATION:

The background material remains as noted in his previous evaluation by Dr. Reuterfors. Of note is that Mr. Hager is a high school graduate and attended Ohio State University where he majored in Agriculture. Although he did not graduate from college, he did complete the majority of his

collegiate curriculum and had sufficient intellectual abilities to accomplish this.

MEDICAL HISTORY:

The patient suffered a severe head injury in June, 1989, and the medical records from the Doctor's Hospital, Columbus, Ohio, were reviewed regarding this injury. These records indicated a left posterior parietal linear skull fracture with a contused brain, intra-cerebral hematoma, and a minor midline shift of brain structures. Physical examination, both during his first admission, and again during this admission, revealed no general pathology as performed by the physician's assistant. During his first admission the patient was assaulted by another inmate and this resulted in a worsening of Mr. Hager's headache symptoms. The patient was observed from a neurologic status and no anatomic or definite changes were noted in his functioning after this assault. He did indicate that he was anxious about being around other people after this incident because he feared another assault. X-rays, post-assault, revealed no changes. Neurological evaluation completed by Dr. Klinkerfuss did not indicate changes. An audiological examination done at the time of his first admission, showed bilateral high frequency sensorineural impairments. Psychological testing done at the time of the first admission revealed a full scale intelligence quotient of 94. His immediate auditory memory was significantly below his performance level on the other sub-tests and he experienced difficulty on arithmetic abilities, although this was intermittent. He showed difficulty in concentrating and performed poorly on sub-test involving visual memory. Wechsler Memory Scale Revised, revealed him to have below average results. The Halstead-Reitan Neuropsychological Test Battery was performed and suggested bilateral organic impairment. The MMPI revealed valid results and a high depression scale. There was a strong indication of a man very concerned about losing further control of his intellectual faculties.

MENTAL STATUS EVALUATION:

The patient was interviewed on a number of occasions while he was hospitalized, both in a formal setting and informally while checking on him in the ward situations. The patient was oriented to time, place, person, and situation. He did not demonstrate delusional ideation. He denied being afflicted with auditory or visual hallucinations. He denied any previous history of mental problems or receiving inpatient or outpatient treatment for such. He complained of depressive symptoms of intermittent appetite, sleep disturbance and depressed mood. He also complained of having headaches and crying spells. During the interviews, as well as when he was observed at other times, he showed a labile affect, at times ending up in a tearful state. He denied any seizure activity or muscular weakness subsequent to his initial assault in the summer of 1989. There was evidence of impairment in short and long term memory, the most pronounced being immediate and short term. He compensates for this by writing down everything that he considers important immediately and carrying a small tablet with him. He also purchsed a watch so that he would not be late for the various functions that he was expected to attend. He also was prone to asking staff questions on a frequent basis, regarding directions and what he should do next. At no time did the patient indicate a rendition of the charges against him and seemed to have no recall other than to state "they say it has something to do with marijuana." The patient demonstrated an impairment in abstract thinking, indicated by difficulty finding similarities and differences between related words, difficulty in defining some words, and in interpreting proverbs. He also demonstrated aphasia, manifested by stuttering and apparently has had a personality change since his injury. Judgment for most situations seemed to be relatively intact, although he seems incapacitated by indecision a great deal of the time and has been found, on numerous occasions, in the hospital at an intersection, trying to decide which way to go.

An evaluation done by Helen M. White, Speech and Language Pathologist, indicated that the patient dem-

onstrated memory disturbances in auditory and visual skills, and non-fluent speech production, assumed to be as a result of the head injury.

HOSPITAL COURSE:

After the initial interview and classification with the treatment team, Mr. Hager was first confined to a closed unit because the individual who had assaulted him previously was on an adjacent ward and it was feared that the other individual was so unpredictable that there was some danger to Mr. Hager. After the other inmate was transferred, Mr. Hager was released to open population and remained on open population throughout the reminder of his hospital stay. His cooperation level was excellent. He at no time was a disciplinary problem and his personal hygiene and room sanitation was good. The patient initially complained of daily headaches and seemed to have trouble orienting to the unit, even though he had been in the vicininty before. He gradually improved on the latter, and developed a routine from which he did not vary and he adjusted fairly well to the unit that he was assigned to. Mr. Hager apparently had no problems with his speech prior to his head injury, nor did he have any difficulty structuring his sentences. He describes himself as having a normal mood and affect prior to his injury. At this time, he seems very sad and depressed. He was especially sad and depressed when he was notified that his wife had been sentenced on IRS charges. He also indicated that he had some difficulty hearing following the head injury.

While hospitalized, Mr. Hager's sister had communicated with myself and indicated that their father had been afflicted for years with a gradually worsening condition, which was described as some type of Alzheimer's dementia and that the senior Mr. Hager has suffered from tremora of the upper extremities for a number of years.

During hospitalization, Mr. Hager's headaches gradually improved. At all times he was very concrete in his dealings with staff members and showed difficulty in grasping abstract con-

cepts or the meaning of staff members instructions if the instructions were conveyed in too rapid a manner. Reevaluation by neurology consultants revealed an impression of post-left hemisphere head trauma with aphasin, recent and remote memory loss, and right-sided hyper-reflexia. The patient had developed a minor head and hand tremor in September or October, 1989, and maintains it to this time.

Laboratory and x-ray studies were essentially unremarkable except for a slightly elevated cholesterol and blood chemistry. Medications include Dilantin, 100 miligrams four times a day, a multivitamin mineral, one tablet twice daily, Lecithin, 19 grains twice a day, Vitamin E, 400 international units three times a day, Hydergine, one milligram twice a daily, Mysotine, 250 milligrams twice a day, Amitriplyline, 100 milligrams at night, and Halcion, 0.25 milligrams at night as needed for sleep. Mr. Hager is felt to have done optimally well on this regimen of medication. Opportunity was made available for Mr. Hager to participate in recreational therapy as well as group therapy; however, he did not participate except minimally in these activities as his attention span was apparently limited and he had difficulty keeping up with the times these opportunities were available. The patient made a number of telephone calls to his relatives from the ward and it was observed by staff members that the stuttering problem was present at all times. It seemed worse at some points when he was particularly anxious or frustrated but at no time was it absent. It is felt by staff at this facility that Mr. Hager at one time historically functioned at a higher level of intellectual capacity and that his present limitations are demonstrable and consistent with a post-brain injury patient. Whereas he has shown some improvement in his frequency and severity of headaches during this hospitalization, his mental functioning has not measurably improved. He in fact, seems more clinically depressed at this time. Whether this is due to concern over his own limitations or as a result of the circumstances of his family is unclear. He at times, appears very frustrated at his limitations and his inability to articulate his thoughts and needs and to function in general.

IMPRESSIONS:

Axis I: 1. Dementia, moderate.
2. Adjustment disorder, with depressed mood.

Axis II: No diagnosis.

Axis III: Status-Post Sub-Dural Hematoma

CONCLUSION:

In my opinion, James Hager is not competent to stand trail for he does not understand the nature and consequences of the legal proceedings and is not capable at this time of aiding counsel in his own defense. He has no concept of the workings of the legal system and has only a rudimentary understanding of the role and function of personnel in a court of law. I do not believe he can plan legal strategy and he is not at this time, capable of testifying relevantly or following the proceedings, whereas he may be able to control his behavior in a court of law.

RECOMMENDATIONS:

It is my opinion as well as that of psychiatric and neurologic colleagues at this facility, that Mr. Hager, while presently incompetent to proceed, is generally a healthy young man, who with proper rehabilitative care has potential to improve. Unfortunately, no facility exists within the Federal Bureau of Prisons for adequate rehabilitative care. Perhaps these facilities exist within the state system of his home of record. It seems indicated that Mr. Hager be involved in a rehabilitative program as soon as possible in order to retrieve higher cortical function for without such care and treatment, his future progress is unpredictable.

/s/ DONALD R. BUTTS, M.D.
Staff Psychiatrist

DRB:md
d: 01-16-90
t: 01-17-90